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No. 20440

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ASSINIBOINE AND SIOUX TRIBES, *Appellants*,

v.

R. E. NORDWICK, et al., *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MONTANA

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

STATEMENT

The statement in Appellant's Brief, adequately summarizes the record and brings into focus the question involved, to-wit: Whether a homestead entry filed and allowed prior to March 3, 1927, culminating in final certificate and patent thereafter, removed the land covered thereby from the oil and gas reservation applicable to "tribal lands undisposed of on the date of approval" of the Act of March 3, 1927 (44 Stat. 1401).

There is, however, one important fact not included in Appellant's statement which should be noted. At the time the Assistant Commissioner of the General Land Office accepted the final

effect given the "undisposed of" provisions, a definite meaning evolved. The special Fort Peck acts of May 30, 1908 (35 Stat. 558), and August 1, 1914 (35 Stat. 582, Sec. 9), contained this precise language, and the Act of February 27, 1917 (39 Stat. 944), referring to coal lands on Indian reservations, contained analogous language. Consideration of each of these acts and the effect given to them through regulations promulgated and instructions issued makes it clear that at the time of 1927 Act was passed the meaning of "undisposed of" was settled as referring only to lands on which no other valid claims or rights had become initiated. It was this meaning which Congress enacted into the 1927 Act. (p.8-12)

ARGUMENT

A. THE LOWER COURT CORRECTLY INTERPRETED THE EFFECT TO BE GIVEN TO THE 1927 ACT.

The analysis made by the lower court as to the Fort Peck laws and the administrative effect given to them over the years clearly supports the conclusion that the lands in suit were not "undisposed of" within the meaning of the 1927 Act.

1. *The powers of Congress and the nature of rights under public land laws are not in dispute and are not decisive of the issue involved.* The power of Congress to reserve the oil and gas in lands existing in the circumstances of subject land is not disputed. The question is whether that is what it intended to do and did do by the language used.

Also appellees take no issue with respect to the nature and extent of rights acquired through a homestead entry under the

public land laws. The point of difference is that Appellant asserts that public land law principles control, while appellees take the position that the objectives of Congress concerning the Fort Peck lands, and the provisions enacted to implement them, are special in nature and not to be measured by public land laws and principles.

2. *There is no fixed definition of "undisposed of" or disposed of" which is applicable in this case.* As is stated in the case of *Phelps v. Harris*, 101 U.S. 370; 25 L. Ed. 855:

"The word is *nomen generalissimum*, and standing by itself, without qualification, has no technical signification."

And in *Hill v. Sumner*, 10 S. Ct. 42, 132 U.S. 118; 33 L. Ed. 284:

"The reference of counsel in their briefs to decided cases attempting to define that word are, of course, of very little avail, as in each instance it must be taken in connection with the circumstances in which it is used."

For further cases concerned with the language "disposed of" see:

McLaren Gold Mines Company v. Morton, 224 Pac. 2d 975 (Montana).

Dayton Brass Castings Company v. Gilligan, 267 Fed. 872, 877.

Springfield Plywood Corporation v. Commissioner of Internal Revenue, 15 T. Ct. 701.

27 C.J.S. page 594, et seq.

Appellant cites departmental decisions, reflecting the view which has been taken in connection with certain public land

problems. We are not here concerned with public land concepts nor with the circumstances involved in these decisions. Neither these decisions, nor any others, can be accepted as determinative of the matter, since the meaning of such language in the 1927 Act is dependent entirely upon the circumstances of its use and the objectives sought, as reflected by a consideration of all the Fort Peck laws involved and the purposes behind them. Thus, a review of such laws is material to the issue.

3. *The Act of May 30, 1908 (35 Stat. 558) is the basic Act for disposal of Fort Peck lands and its provisions provide the only proper measure of the nature and extent of rights existing in an entry made on such lands.* The 1927 Act, which is at issue here, is an amendment to the 1908 Act. Therefore, the 1908 Act, as amended prior to 1927, represents the legal climate in which the 1927 Act was born.

The title of the 1908 Act demonstrates its all inclusive purposes and scope. It reads:

“AN ACT FOR THE SURVEY AND ALLOTMENT OF LANDS NOW EMBRACED WITHIN THE LIMITS OF THE FORT PECK INDIAN RESERVATION, IN THE STATE OF MONTANA, AND THE SALE AND DISPOSAL OF ALL THE SURPLUS LANDS AFTER ALLOTMENT.”

A review of the provisions of this Act shows its comprehensive nature, and points up the fact that it is a special law treating a special land situation in the special way required by the fact that it is Indian land to be devoted to the objective, then the government policy, of severing tribal ties, breaking up Indian reservations, individualizing the Indian as a landowner, disposing of surplus lands for their benefit and otherwise at-

tempting to civilize the Indians themselves. (Federal Indian Law, GPO, pages 251-256). This policy was still in effect when the 1927 Act was passed and did not change until thereafter. (Federal Indian Law, GPO, page 256)

The provisions of this Act for disposal of surplus lands to Non-Indians are not only detailed and explicit but unique in their nature. The reclamation and homestead laws are incorporated, but with additions or modifications to meet the peculiar circumstances of the reservation. Water rights, irrigation charges and land reclamation are treated with detailed specifics. Entries are allowed only at the time and in the manner provided by Presidential Proclamation, the amount and due date of payments are prescribed, and special provisions exist as to aliens, as to commutation, as to desert land entries, as to disposal under the reclamation act, as to mineral and coal land laws, as to townsite purposes, etc., (Sections 8 through 14). A Presidential Proclamation opening the land not only provided unusual procedures (Proc. July 25, 1913, IV Kappler 1192) but treated special situations arising, (Proclamations, March 21, 1917, April 28, 1917, March 14, 1918, IV Kappler 970, 978 and 986 respectively).

In other words, this Act was not intended to be operative according to existing public land laws, but in the special manner and on the retailed terms set forth in the Act and in the Presidential Proclamations issued thereunder. It is not a public land law and cannot be gauged by public land law principles if justice is to be done to the rights of those acquiring land thereunder.

This is particularly true with respect to the problem con-

cerned here, i.e., the effect of the language "undisposed of" as used in the 1927 Act.

4. "*Undisposed of*" — 1908 Act: The language "undisposed of" was not new to the 1927 Act. It appears in the 1908 Act as follows:

"Sec. 11. That all lands hereby open to settlement remaining *undisposed of* at the end of five years from the date of President's proclamation to entry shall be sold to the highest bidder for cash at no less than \$1.25 per acre, under regulations to be prescribed by the Secretary of the Interior;" (Emphasis supplied)

The intention of this provision in the 1908 Act is obvious. This Act contemplated disposal of the entire reservation, with the lands in excess of Indian needs to be converted into money for the benefit of the Indians. By specific provision (Sec. 13, 1908 Act) the United States was acting as trustee for the Indians to dispose of the lands and collect and hold the money received for their benefit. Under this responsibility the United States could not allow the disposal processes to stagnate. Thus, the law provided an ancillary means for accomplishing a sale of the lands which, after a reasonable period of time, had not attracted any persons interested in them under the procedures and terms of the homestead method of acquisition. Lands which were in the process of being disposed of through the homestead process, considered to be the more desirable means, could not have been intended as the target for this provision for they were the lands on which the objectives of the Act were being accomplished and with respect to which the obligations of the United States as trustee were being fulfilled. An analysis of the application of this provision to lands already entered will demonstrate the validity of this view.

For example, the date of the President's proclamation to entry was July 25, 1913. Under its terms the first date entry could actually be made on May 1, 1914 under the public drawing system prescribed (Proc. Sec. 6). June 30, 1914 was the first date for settlement and entry in any other manner. (Proc. Sec. 8). Every entryman had 5 years from date of entry to make full payment, and 7 years to submit final proof. (Sec. 8, 1908 Act)

Assume an entry made on May 1, 1914: Final payment would be due on April 30, 1919 and final proof due on April 30, 1921. However, the period prescribed by Sec. 11 of the 1908 Act, being 5 years from date of President's proclamation, would be not later than July 25, 1918. On that date all land remaining "undisposed of" is to be sold to the highest bidder for cash. However, on that date, *neither full payment no final proof were due*. Can it be said, therefore, that "undisposed of" applied to an entry made but not yet paid for or completed? If so, every entry existing would fail and be put on the auction block. This result could not have been intended by Congress and was not followed in actual practice.

5. *Administrative practice — 1908 Act*: The instructions of the Commissioner of the General Land Office on May 14, 1918 (46 L.D. 380) with respect to Section 11 of the 1908 Act shows the effect given to the language "undisposed of". After stating that nonmineral lands opened by the first proclamation would be automatically withdrawn from disposition under the homestead and desert land laws, for the purpose of sale, on July 25, 1918, if then undisposed of, he specifies the situations where the lands will not be considered undisposed of:

"Homestead and desert land entries may be allowed after July 25, 1918, for nonmineral lands on the res-

ervation under the following circumstances:

“(A) A settler on the lands may make entry after July 25, 1918, if he made settlement within three months prior to that time, and presents a proper application to enter within the three months allowed for that purpose.

“(B) Lands which on July 25, 1918, are embraced in a homestead or desert land entry may be re-entered if such entry is cancelled on contest, relinquishment or otherwise.

“(C) Lands which on July 25, 1918, are embraced in a prior withdrawal may be entered if such prior withdrawal is revoked.”

Under those instructions there doesn't even have to be an entry or application on file, mere settlement being a disposal (A). Likewise an existing entry is a disposal (B) and so is a withdrawal of any kind (C).

The conclusion appears inescapable, upon an examination of the 1908 act and the instructions issued thereunder, that “undisposed of” meant land upon which no lawful *claim* had been made, even if such claim constituted an inchoate rather than a vested right.

This is the view which, in effect, was adopted by the lower Court. Appellant in his brief (page 24) disagrees with this conclusion and states that a review of the whole of Section 11 shows that both “undisposed of” and “unsold” are used, the first with respect to lands remaining after five years from Presidential Proclamation and the second as to lands remaining after ten years. His point is not clear other than it is said the two phrases are used interchangeably and that “undisposed of” means “unsold” or “unentered”. (Page 26) Appellees agree that “undisposed of” means “unentered” in the 1908 Act, but

insists that the same language means the same thing in the 1927 Act.

6. "*Undisposed of*" — 1914 Act: The language "undisposed of" was used in another Fort Peck Act, prior to the 1927 Act. (Act of August 1, 1914, 35 Stat. 582, Sec. 9). It reads as follows:

"That the Secretary of the Interior is hereby authorized to make allotments in accordance with the provisions of the Act of May thirtieth, nineteen hundred and eight (Thirty-fifth statutes, page five hundred and fifty-eight) to children on the Fort Peck Reservation who have not received, but who are entitled to, allotments as along as any of the surplus lands within said reservation remain *undisposed of*, such allotments to be made under such rules and regulations as the Secretary of the Interior may prescribe." (Emphasis supplied)

The instructions of the Commissioner of the General Land Office of May 14, 1918, *supra*, also relate to the effect of this act. He states:

"The section last cited (Act of August 1, 1914) will permit allotments to Indians to be made on the lands withdrawn from disposition under the homestead and desert land laws, for the purpose of sale, until such time as the sale is directed by the Secretary of the Interior."

An analysis of this statement will show that this instruction is saying that only those lands on which there is no settlement, even if not filed (A) and no entry (B) or withdrawal (C) are subject to allotment as being lands "undisposed of".

This interpretation conforms to the purposes and objectives of the 1908 Act. If entries then made, but unperfected, were to be considered undisposed of, and therefore subject to allot-

ment, *every homesteader could have had his lands allotted out from under him.*

7. *Act of February 27, 1917 is analogous:* Closely analogous to this situation is the problem presented by the Act of February 27, 1917 (39 Stat. 944, 30 USCA Sec. 87). This Act related to the disposition of coal lands on Indian reservations, with a reservation thereof to the United States. It applied to lands "not otherwise reserved or disposed of". The similarity of the language in this Act of 1917 with the language contained in the 1927 Act, makes appropriate the interpretation and effect given to the coal reservation act. A question arose in applying the 1917 Act to a homestead entry on Fort Peck lands as to whether an entry made June 4, 1915, allowed January 25, 1916, upon which final proof was submitted July 2, 1920, and final certificate issued December 7, 1923, should be patented with a reservation of coal to the United States, the land having been classclassified as coal land on April 17, 1917. In a letter by E. C. Finney, First Assistant Secretary, directed to the Commissioner of the General Land Office, dated July 25, 1924, instructions were given (Circulars and Regulations of the General Land Office, January, 1930, pp. 709-710, 51 L.D. 76) as follows:

"Entries of land in the former Fort Peck Indian Reservation allowed pursuant to the classification provided for by the Act of May 30, 1908, *supra*, and prior to any other subsequent classification of the land as valuable for coal, are not affected by the Act of February 27, 1917, *supra*."

Thus, it appears that although the language "undisposed of" appears ambiguous standing by itself, the truth is its meaning

was well established by administrative practice for many years prior to the 1927 Act. It is to be presumed that if Congress intended, as already stated, that the effect given to this language should be different from the interpretation already existing and in use, it would have provided other language to indicate its intention and desires for a different result. This it did not do.

8. *Act of March 3, 1927*: The circumstances under which the words "undisposed of" were inserted in the 1927 Act shows affirmation by Congress of the meaning established for that language in prior acts through the instructions given and practice followed by the department for a period of many years. The House Report of the Committee of Indian Affairs (H. Rept. No. 1966 69th Cong. 2nd sess. 1927) reveals how these words became inserted in the 1927 Act. Section 1 of the original bill provided:

"That all coal and other minerals, including oil and gas, in the tribal lands within the Fort Peck Indian Reservation, Montana, *not disposed of* at the time of the passage of this act * * * are hereby reserved specifically to the Indians on such reservation, and the title to all mineral deposits reserved to the United States in lands within such reservation and *not disposed of* at the time of the passage of this act is hereby reinvested in such Indians." (Emphasis supplied)

This section was stricken from the bill, at the recommendation of the Secretary of the Interior, and the Section 1 of the Act as finally passed was substituted in its place. The substituted paragraph, in addition to restricting its application to oil and gas, specifically modified the words "not disposed of" to read "undisposed of" resulting in exactly the same language as contained in the 1908 and 1914 Acts. Such detailed consistency

is a strong indication of an intention to continue the interpretation placed upon this language previously settled and in use by the administrative agencies.

Following the passage of the 1927 Act, the effect given to the language in question, as established prior to that enactment, and apparently intended to be continued by the inclusion of such language in the 1927 Act, was continued in a letter of instructions by the Commissioner to the Register, Great Falls, Montana, dated January 18, 1929. This letter states that the reservation of oil and gas provided by the 1927 Act is to be effective to only future applications for homestead entries on Fort Peck lands. It does not state that entries prior to 1927, but uncompleted, are subject to the 1927 Act. This letter (Circulars and Regulations of the General Land Office, January, 1930, pages 715-716) is the document referred to and further substantiated by the decision on Allotments To Fort Peck (and other) Indians (53 L.D. 538), at page 544, which states:

"It is also noticed that regulations of January 18, 1929 (Circulars and Regulations of the General Land Office 1930, pp. 715, 716) providing for reservation of oil and gas under the Act of March 3, 1927 in homestead entries made upon the Fort Peck lands directed that the reservation be made only upon future applications, and made no such requirement as to pending unperfected entries at the date of the Act, which implies the construction that something less than a complete equitable title and vested right to a patent constituted a disposal of the land under the Act."

In view of this it is clear why the Assistant Commissioner, when he wrote the Register in Great Falls accepting the proof submitted by Nordwick, stated that the oil and gas was to be reserved only as to the additional entry and not the 160 acres

concerned in the appeal. (Def. Ex. 64) Unfortunately, and through clerical error, this instruction was not followed. It is also clear from this that the provisions of the final certificate issued did not reflect the practice of the department then in force, but is an example of action taken, by inadvertance, directly contrary to the established practice and the specific instructions issued from Washington, D.C.

9. *Departmental decisions in allotment cases.* The departmental decisions in Raymond Bear Hill, 52 L.D. 688, (July 31, 1929) and Mineral Reservations in Trust Patents for Allotments to Fort Peck and Uncompaggre Ute Indians, 53 L.D. 538, although concerning Indian allotments only, are demonstrative of the interpretation given "undisposed of" as any entry which renders the land no longer subject to other disposal or reservation. This is the case with a homestead entry and the lower court was correct in its assessment of the significance of these decisions in determining the administrative practice established under the 1927 Act.

10. *Administrative interpretation, of long standing, is entitled to great weight.* There are no Court decisions defining the effect given to "undisposed of" in the Fort Peck laws or the laws of any other reservation. But a definite meaning has evolved through administrative effect given, and continued over the years, as applicable not only to the land in dispute, but to all land similarly situated. Although not controlling upon the Courts, the decisions of the department are entitled to great weight.

"Many thousands of acres have been patented to individuals under that interpretation, and to disturb it now would be productive of serious and harmful results.

The situation, therefore, calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration is entitled to the highest respect and, if acted upon for a number of years, will not be disturbed except for very cogent reasons." *Logan v. Davis*, 34 S. Ct. 685, 233 U.S. 613, 58 L.Ed. 1121.

See also: *LaRoque v. United States*, 239 U.S. 62, 64; 60 L.Ed. 150; 36 S.Ct. 23, *McLaren v. Fleischer*, 256 U.S. 477, 481; 65 L.Ed. 1053; 41 S.Ct. 578, *Swendig v. Washington Water Power Company*, 265 U.S. 331; 68 L.Ed. 1040; 44 S.Ct. 499, *United States v. Minnesota*, 270 U.S. 181, 205; 70 L.Ed. 549; 46 S.Ct. 305, *Norwegian Nitrogen Products Company v. United States*, 288 U.S. 294, 315; 77 L.Ed. 807; 53 S.Ct. 358. *United States v. Jackson*, 280 U.S. 183, 193; 74 L.Ed. 361; 50 S.Ct. 143.

This rule is of particular force where the administrative agency interpreting it sponsored or participated in its drafting and enactment, as is the case here. *Blanset v. Cardin*, 256 U.S. 319; 326.

The rule is further fortified where the administrative interpretation has apparently been acquiesced in by Congress by its failure to interrupt the already settled interpretation given prior to the amendment consisting of the 1927 Act. *United States v. Leslie Salt Company*, 350 U.S. 383, 396; 100 L.Ed. 451; 76 S.Ct. 424.

11. *Possible widespread effect of problem involved:* Also to be considered is the fact that although this phase concerns only 160 acres, a large quantity of other lands may be affected by this same problem. In the testimony of Mr. Charles Eggers, Superintendent of the Fort Peck Indian Agency, before the

Senate Subcommittee of the Committee on Indian Affairs, held July 23, 1929, at Poplar, Montana, (page 12322), the following statement appears:

“We have 147,452 acres of land, homestead land on this reservation yet that has not been patented — the reason being that final payments have not been made.”

Reference is also made to the case of Fort Peck Indians v. United States, 132 F.Supp. 222, from which it appears within the four fiscal years ending June 30, 1917, 604,885 acres had been entered. This case will also show the difficulties which the entrymen had in paying for the entered lands, resulting in extensions of time granted by the Act of March 3, 1925 (53 Stat. 1267, 4 Kappler 507) and the Act of June 15, 1926 (44 Stat. 746, 4 Kappler 559).

From all this it appears that the problem here concerned may be common to a very substantial amount of acreage lying within the Fort Peck Reservation. If all of the entries outstanding were completed, with patents issuing without reservation of the oil and gas for the tribe, in conformity with the then departmental instructions and practice, they will be affected by the decision in this case. A duty will then presumably be imposed upon the United States to take action in a very large number of cases to secure restoration of tribal ownership of the oil and gas.

12. *Acts extending payment due date:* It is to be noted that the language of the Act of June 15, 1926, supra, recognizes that the status of lands subject to an existing entry is different from that existing with respect to tribal lands. Section 2 of the act, provides as follows:

"Section 2. Upon failure of any person to make complete payment of the required amount within the period of any extension granted in accordance with the provisions of this act, the homestead entry of such person shall be cancelled *and the land shall revert to the status of other tribal lands of the Fort Peck Indian Reservation.*" (Emphasis supplied)

B. NORDWICK WAS NOT BARRED BY LACHES OR ESTOPPED FROM CLAIMING THE OIL AND GAS.

1. *Lower Court's view is correct.* The lower court's treatment of the Appellant's claim that Nordwick was barred by laches and estopped is correct. The question is one of law rather than fact. The departmental decisions referred to in Appellant's brief were properly distinguished by the lower court.

Issuance of the supplemental patent conveying the oil and gas in the land in suit only constituted conforming the record to the effect of the law in force at the time of the original patent. It corrected the error made when the patent was issued on terms contrary to instructions given and the practice then established.

2. *Grant under a patent is controlled by statute.* It is well settled that the grant in a patent is measured by the statutes under which it is issued. The law inserts a reservation where the statute requires it, even when omitted in the patent. *United States v. Frisbee*, 57 F.Supp. 299. Conversely, the law grants what is provided by statute even if reserved or excepted by the terms of the patent. As stated in *Francoeur v. Newhouse*, 40 F. 618:

"... An exception inserted in a patent, in express terms, by the secretary of the interior, not required or authorized by the statutes, is void."

See also: *Burke v. Southern Pacific Railroad Company* 234 U.S. 669, 710; 58 L.Ed. 1527; 34 S.Ct. 907, and *Cowell v. Lammers*, 21 F. 200,208, and *United States v. 3.08 acres of land*, 209 F.Supp. 652.

CONCLUSION

The judgment below relating to the 160 acres should be affirmed.

Respectfully submitted,
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Certification

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Charles Luedke

